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## Charity Law and Public Benefit in Scotland

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Charities in Scotland are facing considerable financial challenges. One consequence of which appears to be heightened reliance on income from connected concerns. This has led to questions on the meaning and nature of public benefit in charity law. The subject came to the fore in the case of the Office of the Scottish Charity Regulator v New Lanark Hotels Ltd. [2021] CSIH 7 (OSCR v NLH).

The Inner House of the Court of Session handed down its judgment in OSCR v NLH on 29 January. The appellant, the Office of the Scottish Charity Regulator, was created and operates under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act). It is charged with, in part, determining whether bodies are charities and keeping a public register of those so determined.

In carrying out its statutory functions OSCR refused to include within the Scottish Charities Register NLH and New Lanark Trading Ltd. (NL Trading), the respondents. Both of which were wholly owned trading subsidiaries of New Lanark Trust (NLT), the charity managing the UNESCO World Heritage Site. Their principle purpose was to produce income to be donated by gift aid to NLT. At the heart of the case was that decision, and in particular whether the public benefit part of the charity test under s 7(1)(b) of the 2005 Act was satisfied.

The charity test has two parts. A body's purpose must consist of only one or more charitable purposes, and it must provide or intend to provide public benefit. The 2005 Act does not define public benefit. Instead it *inter alia* provides, in s 8, that no particular purpose is to be presumed to be for the public benefit, and that a benefit gained or likely to be gained by the body or other persons and the disbenefit incurred or likely to be incurred by the public must be compared with the benefit accruing or likely to accrue to the public.

OSCR found that whilst NL Trading undertook some activities advancing its charitable purposes and providing public benefit, other activities, such as its shop, café and ice-cream manufacturing, did not provide public benefit. NLH, it decided, carried out significant activities, operating the hotel etc., which did not further its charitable purpose. OSCR found that a distinction had to be drawn between activities which directly advanced a charitable purpose, and non-charitable activities undertaken with the aim of generating profits to be applied for charitable purposes. The primary activities of NLH were related to the provision of accommodation therefore there was no public benefit.

NL Trading and NLH challenged the decisions of OSCR. The First Tribunal (FtT) upheld OSCR's position. On appeal the Upper Tribunal (UT) quashed its decision to refuse to enter the two concerns on the register and ordered that they should be registered. It found that the question of whether a body was providing a public

benefit required a broad enquiry into the whole of its activities (at para 10). OSCR appealed to the Court of Session.

Three grounds of appeal were put forward. Firstly, it was argued that the UT had erred in finding that where a body had two purposes it was not necessary nor appropriate to carrying out a balancing exercise between them. Those purposes were raising funds and contributing to an organisation's charitable purposes. Secondly, it was suggested that the UT erred its characterisation of the guidance OSCR produced pursuant to the 2005 Act. Thirdly, OSCR argued the UT erred in concluding that ice-cream production and accommodation provision furthered the charitable purposes of both bodies through educational and heritage purposes. As to the educational purpose, it was averred that the UT should have had regard to its guidance which *inter alia* stated that education "... must have a structure and be capable of educating the audience" (at para 12).

#### The Inner House Decision

The judgment of the Inner House was given by the Lord Justice Clerk. Also on the bench were Lord Malcolm and Lord Doherty. She began by setting out what was agreed by the parties. This was that a 'materiality' requirement was inherent in the statutory public benefit test, that the activities of the body needed to be looked at in the round and as a whole in deciding whether they provide such a benefit, and that activities that make a minor or trivial contribution to the charitable purposes in the context of extensive commercial activities would be insufficient (at para 13). As such it was noted that a trading subsidiary whose main activity was selling Christmas cards to raise funds for the primary charity would neither have nor further a charitable purpose. The respondents also noted that they took no issue with the guidance issued by the appellant, arguing that the UT decision was in accordance with it.

Following iterating the agreed matters and the appellate functions of the FtT and UT the Lord Justice Clerk set out the facts as found by both the FtT and UT relating to both respondents jointly and specifically to each. One finding of the UT was ultimately determinative of the appeal. This was that the New Lanark site "... is not merely preserved, but maintained as a living village so that visitors may, so far as practicable, experience the original concept..." (para 21). That being, it will be recalled, the development of an 'ideal' community under the ownership of Robert Owen at the turn of the 19<sup>th</sup> century.

The Lord Justice Clerk observed that the UT assessed the activities of the respondents in the near-unique context of the living village of New Lanark and in promoting understanding of the philanthropic intent at the heart of its founding. The UT had found, she said, that all the activities of the respondents advanced charitable purposes. Carrying out a balancing exercise between those activities which advanced charitable purposes and those that did not, therefore, was not necessary (para 23).

The Lord Justice Clerk further found that the UT did not reject the point within the OSCR guidance that activity could be classified as primary or non-primary. Rather, it had simply held that since all the activities of the respondents were found to be primary that distinction was unnecessary. She held that OSCR's disagreement with the UT's assessment on that issue centred upon a matter of fact, not legal principle. As to the OSCR guidance, the Inner House found that the UT had not concluded that it adherence to it was merely desirable, but rather that it could not be determinative of the interpretation of the 2005 Act (at para 25). It was held that the UT decision was in accordance with it. Finally, the Lord Justice Clerk addressed the criticisms of specific UT findings. Here she held that the ice-cream and accommodation businesses were both aspects of presenting New Lanark as a functioning, living village. The essentials of the appeals were, she held, no more than disagreements with the UT's findings of fact. They were refused.

### Analysis

The decision in OSCR v NLH ultimately turned upon the particular facts of the case and the UT's interpretation of them. The 'almost unique' nature of New Lanark as a living village was decisive. It was such that all of the activities at the site "... contributed to the vitality which was central to the presentation of New Lanark as a World Heritage Site" (para 22). All the activities of NL Trading and NLH were primary purpose trading in that they directly contributed to both charities achieving their purposes. That meant the decision of the UT aligned with OSCR's position on public benefit found within its Meeting the Charity Test guidance and charities' primary purpose trading iterated in its Charities and Trading Guide.

The fact that OSCR v NLH hinged upon the nature of New Lanark as a living village means the case will offer relatively little assistance in seemingly kindred cases in future. Trading concerns within historic and heritage charitable sites not having that character will likely face difficulties in satisfying the public benefit requirements of the 2005 Act and OSCR guidance.

A further notable aspect of the case pertains to the authority of OSCR's guidance. The Lord Justice Clerk notes in her opinion that the proposition that the guidance could be legally determinative of the interpretation of the 2005 Act was 'at the very least floated before the tribunals' (at para 25). She continued by pointing out that that view was 'quite properly disavowed' in the appeal before her (at para 25). Whilst the guidance iterates OSCR's approach to the charity test it is, of course, for the courts to authoritatively interpret the meaning of the relevant legislation.

### Conclusion

It has been estimated by the National Council for Voluntary Organisations that declines in income of over fifty percent have been experienced by charities in England as a result of the pandemic. It is not unreasonable to suggest that a similar decline has occurred in Scotland. In conjunction, a number of charities may have experienced an increase in demand for their services. The point here is that

funding pressures on many Scottish charities are pronounced. Whilst the Scottish charity law consultation that concluded in 2019 did not consider charitable income, an argument may be tenable that in light such circumstances the rules governing public benefit and trading illustrated by *OSCR v NLH* should be revisited.